

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 17, 2006 Session

**KENNETH GEORGE SMITHSON, II v. INGE LORA TAUBITZ
SMITHSON**

**Appeal from the Chancery Court for Williamson County
No. 30472 Russ Heldman, Chancellor**

No. M2006-00269-COA-R3-CV - Filed on December 28, 2006

Husband appeals the parenting plan adopted by the trial court, the award of rehabilitative alimony and attorney's fees, and the award of child support as a result of the divorce granted to Wife. We affirm the adoption of the parenting plan and award of attorney's fees. We modify the rehabilitative alimony award as well as the child support award. The modification of the child support award is in conformance with the stipulation of the parties on appeal and the appropriate calculations under current child support guidelines. The cause is remanded for further proceedings.

**Tenn. R. App. P. Appeal as or Right; Judgment of the Chancery Court Affirmed as
Modified**

WILLIAM B. CAIN, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL and FRANK G. CLEMENT, JR., JJ., joined.

Aminah M. Collick and Gregory Dye Smith, Nashville, Tennessee, for the appellant, Kenneth George Smithson, II.

Michael W. Binkley, Nashville, Tennessee, for the appellee, Inge Lora Taubitz Smithson.

OPINION

Kenneth George Smithson, II and Inge Lora Taubitz married in 1988. Two children were born to the marriage. By the time of the filing of the Complaint for Divorce, Dr. Kenneth Smithson had obtained degrees in neuroscience, physiology and osteopathy. He commanded an annual salary between \$180,000 and \$220,000. Although Mrs. Smithson has a masters in biology, she has not worked full-time outside the home since her employment as a lab assistant in 1995, prior to the birth of the couple's first child. Her latest employment was as a part-time life guard in 2003.

Dr. Smithson filed his Complaint for Divorce on March 19, 2004, alleging the sole ground of irreconcilable differences. Mrs. Smithson answered and counterclaimed on April 14, 2004,

alleging inappropriate marital conduct in addition to irreconcilable differences. Her answer also alleged the depletion of \$60,000 in marital assets and sought a restraining order protecting the remainder of the estate from dissipation. By the time Chancellor Heldman heard this cause on December 21, 2005, the parties had stipulated to Dr. Smithson's alcohol and drug addiction which resulted in two (2) episodes of treatment in 1994 and 2004. At the time of the 2005 hearing, Dr. Smithson had been 16 months in recovery from drugs and alcohol and was on probation as a result of a DUI guilty plea. After this hearing, the trial court granted a divorce to Mrs. Smithson on the ground of inappropriate marital conduct, adopted Mrs. Smithson's parenting plan and found that the husband had an earning capacity of \$220,000. The court specifically found that Dr. Smithson lacked credibility and awarded \$3,200 per month child support, \$4,500 per month rehabilitative alimony and \$1,800 per month in transitional alimony pending sale of the marital residence. The court also required that Dr. Smithson pay Mrs. Smithson's COBRA conversion premium and all of the children's unreimbursed medical expenses. The court also awarded \$48,549 in attorney's fees to Mrs. Smithson. Dr. Smithson then perfected this appeal, challenging the trial court's award of alimony, its refusal to permit "standard parenting time," the setting of child support, the division of marital property, the finding of dissipation of marital assets, and the award of attorney's fees.

I. ALIMONY

Whether an alimony award is appropriate is dependent on the facts and circumstances of each case. The need of the recipient spouse, followed by the obligor's ability to pay, are the primary considerations in the determination of an award of alimony. *Lancaster v. Lancaster*, 671 S.W.2d 501, 503 (Tenn.Ct.App.1984); *Goodman v. Goodman*, 8 S.W.3d 289, 295 (Tenn.Ct.App.1999). In making its determination of an alimony award, the court must balance several statutory factors including those enumerated in section 36-5-101(d)(1) of the Tennessee Code. The trial court has broad discretion in determining the type, amount, and duration of alimony based upon the particular facts of each case. *Kinard v. Kinard*, 986 S.W.2d 220 (Tenn.Ct.App.1998). The amount of alimony is largely within the discretion of the trial court. *Burlew v. Burlew*, 40 S.W.3d 465, 470 (Tenn.2001). This Court is not inclined to alter a trial court's award of alimony absent a finding of an abuse of discretion. *Id.*

Sullivan v. Sullivan, 107 S.W.3d 507, 510-11 (Tenn.Ct.App.2002)(footnote omitted).

Dr. Smithson urges first that the trial court's award of rehabilitative alimony amounts to an abuse of discretion in that it "far exceeded the bounds of reasonableness." The alimony award, says Dr. Smithson, is not only beyond his ability to pay, but also beyond his ex-wife's need. The first question that Dr. Smithson poses to this Court is whether the \$4,500 in rehabilitative alimony for 12 years is appropriate in amount and duration given his ability to pay and his ex-wife's need as established by the record. The purpose of rehabilitative alimony is defined by statute:

(e)(1) Rehabilitative alimony is a separate class of spousal support, as distinguished from alimony in solido, alimony in futuro, and transitional alimony. To be rehabilitated means to achieve, with reasonable effort, an earning capacity that will permit the economically disadvantaged spouse's standard of living after the divorce to be reasonably comparable to the standard of living enjoyed during the marriage, or to the post-divorce standard of living expected to be available to the other spouse, considering the relevant statutory factors and the equities between the parties.

(2) An award of rehabilitative alimony shall remain in the court's control for the duration of such award, and may be increased, decreased, terminated, extended, or otherwise modified, upon a showing of a substantial and material change in circumstances. For rehabilitative alimony to be extended beyond the term initially established by the court, or to be increased in amount, or both, the recipient of the rehabilitative alimony shall have the burden of proving that all reasonable efforts at rehabilitation have been made and have been unsuccessful.

(3) Rehabilitative alimony shall terminate upon the death of the recipient. Rehabilitative alimony shall also terminate upon the death of the payor, unless otherwise specifically stated.

Tenn.Code Ann. § 36-5-121(e)(1-3) (2006).

In addition, the statute provides the considerations that guide the award of alimony in the trial court:

(i) In determining whether the granting of an order for payment of support and maintenance to a party is appropriate, and in determining the nature, amount, length of term, and manner of payment, the court shall consider all relevant factors, including:

(1) The relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;

(2) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party's earnings capacity to a reasonable level;

(3) The duration of the marriage;

(4) The age and mental condition of each party;

(5) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;

(6) The extent to which it would be undesirable for a party to seek employment outside the home, because such party will be custodian of a minor child of the marriage;

(7) The separate assets of each party, both real and personal, tangible and intangible;

- (8) The provisions made with regard to the marital property, as defined in § 36-4-121;
- (9) The standard of living of the parties established during the marriage;
- (10) The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training or increased earning power of the other party;
- (11) The relative fault of the parties, in cases where the court, in its discretion, deems it appropriate to do so; and
- (12) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

Tenn.Code Ann. § 36-5-121(i)(1-12) (2006).

None of these factors should be considered in isolation. The standard of living established during the marriage and the undesirability of outside the home employment of a spouse having primary responsibility for raising children are indeed important factors but are not necessarily controlling factors.

The marital standard of living is one of several factors enumerated by the legislature for consideration in awarding alimony. Tenn.Code Ann. § 36-5-101(d)(1)(I). We disagree, however, with the Court of Appeals' conclusion that this sole factor is the standard by which a court must determine whether an economically disadvantaged spouse can be rehabilitated. Instead, a trial court must consider every relevant factor in § 36-5-101(d)(1) to determine the nature and extent of support, which includes the decision to award rehabilitative alimony. The prior concept of alimony as lifelong support enabling the disadvantaged spouse to maintain the standard of living established during the marriage has been superseded by the legislature's establishment of a preference for rehabilitative alimony. *See id.* at 359; *Self v. Self*, 861 S.W.2d 360, 361 (Tenn.1993); *see also Blaine v. Blaine*, 336 Md. 49, 646 A.2d 413, 423 (1994). The parties' incomes and assets will not always be sufficient for them to achieve the same standard of living after divorce that they enjoyed during the marriage. *See Crabtree*, 16 S.W.3d at 359-60. However, rehabilitative alimony may assist the disadvantaged spouse in obtaining further education or training. *See Isbell v. Isbell*, 816 S.W.2d 735, 738-39 (Tenn.1991); *see also In re Marriage of Grauer*, 478 N.W.2d 83, 85 (Iowa Ct.App.1991) ("Rehabilitative alimony serves to support an economically dependent spouse 'through a limited period of re-education or retraining following divorce, thereby creating incentive and opportunity for that spouse to become self-supporting.'"). It may also provide temporary income to support the disadvantaged spouse during the post-divorce economic adjustment. *See, e.g., Crabtree*, 16 S.W.3d at 360-61.

All relevant factors, including those set out in § 36-5-101(d)(1), must be considered on a case-by-case basis to determine the nature and extent of support.

Robertson v. Robertson, 76 S.W.3d 337, 340-41 (Tenn.2002)(emphasis added).

At trial, Mrs. Smithson testified as to her goals concerning rehabilitation and her need for retraining.

Q. Last thing, alimony. You've asked the Court to award rehabilitative alimony at \$6,250 a month for a period of 15 years; is that correct?

A. Correct.

Q. Now, what is your plan, short-term, just very briefly.

THE COURT: Hold on. Mr. Smithson, you're being very dramatic over there. I can just tell you that it doesn't help your case.

MR. SMITHSON: I'm sorry.

BY MR. BINKLEY:

Q. What is your short-term plan for rehabilitation?

A. Obviously, my children and I have been through a lot, and for their sake and as well as mine, I would like to try to take things one step at a time.

Within the next year or two, after I sell the house and relocate, at that point pursue part-time employment. That would allow me to still be involved with the children's school and their extracurricular activities, so they won't feel abandoned by their mother.

Q. Okay.

A. My hope is when they're in high school, I'll pursue full-time employment.

On cross-examination, the following information was provided to the court:

BY MR. TURNER:

Q. Ms. Smithson, do I understand that your request is to have rehabilitative alimony of 6,200 a month for 15 years?

A. Correct.

Q. What are you going to do that is going to require \$6,200 a month for 15 years? What are you going to use that money to rehabilitate yourself? What is your ultimate goal?

MR. BINKLEY: Those are five questions. I just want to know which one he wants her to answer?

THE COURT: What is your goal with that money?

THE WITNESS: My goal is to allow me to stay active in my children's lives so that they will not feel abandon[ed] during that time, and I can obtain training so that my skills will be marketable. I will have to change careers. I don't feel working in the research field is stable, just due to the funding situation.

Dr. Smithson's counsel vigorously questioned Mrs. Smithson about her skills and master's degree in biology and pointed out a lack of employment from the time of filing for the divorce to the present. Both children are in school now, and Mrs. Smithson is currently considering a re-entry into the work force, at least on a part-time basis. She testified on cross-examination to the sporadic nature of grant-funded research in immunocytochemistry.

She asked only for rehabilitative alimony but in the amount of \$6,250 per month for 15 years. Under the facts as they appear in the record, the youngest child will attain majority eleven (11) years from the date of divorce. The record reveals that the second child will attain high school age roughly eight (8) years from the divorce. There is no showing that these children have special education or care needs that would necessitate more time at home to care for the children. Mrs. Smithson indicated her own desire to return to work full time once the youngest child enters high school. As a result, the 12-year rehabilitative period assigned by the trial court is not supported by the record. The period of rehabilitative alimony is reduced to eight (8) years. The amount should remain unchanged.

II. THE PARENTING PLAN AND CHILD SUPPORT

In its order, the trial court adopted Mrs. Smithson's parenting plan which provided no significant parenting time for Dr. Smithson. In this respect, the record clearly indicates that Dr. Smithson's addiction to Ketamine and alcohol, as well as the unchallenged finding relative to his credibility, are reasonable considerations in determining the best interests of the children, the paramount consideration in any custody arrangement. *Shofner v. Shofner*, 181 S.W.3d 703, 715-16 (Tenn.Ct.App.2004). One of the primary factors motivating the trial court in drastically restricting the parenting time of Dr. Smithson was his admitted long-standing addiction to alcohol and drugs. The trial court took notice of the undisputed testimony that at the time of trial Dr. Smithson had been in recovery for 16 months. The court further noted, however, that he had on previous occasions received treatment for his addictions and relapsed into active alcohol and drug use. So much of the restriction on the parenting relationship between Dr. Smithson and his children was based upon the history of his addiction. The trial court recognized his efforts at recovery and held out the hope that continuing successful recovery would allow his parenting relationship to improve:

Dr. Smithson, as of 16 months ago, there is testimony from the expert that he was improving and following the plan for him to come out of the addiction, but between then and now, there's no evidence that the Court can be assured that he's still not at risk. He's an addict in recovery. The Court is of the opinion that he is still at risk for relapse at this time, but that's just at this time.

...

THE COURT: This is the big concern of the Court, his ability to keep it going, and that gives the Court much more concern. . .

That's something that's a life-long process, recovery is a life-long process. . . . so that does give the Court concern about visitation, and that's where the greatest concern comes at this time, the stability.

. . .

I've looked at the statutory parenting factors, the Court is of the opinion that it is in the best interest of these children at this time for the mother to be the primary residential parent and for the father to be the nonresidential parent. The Court is going to find that it's in their best interest to adopt what the mother has proposed for now to be the parenting plan.

I can only rule based upon now. I can't speculate on going forward, but we do know the evidence is that Dr. Smithson does have some driving restrictions, and I'm just of the opinion that he's still at risk due to the fact that he's dealing with recovery for something very significant.

So at this particular time, I'm going to adopt the parenting plan, which grants less than standard visitation for nonresidential time, at this time.

That's not to preclude the Court broadening that without prejudice to request in the future to broaden that based upon change of circumstances, substantial change of circumstances, but right now in the life of the children, the evidence supports what the mother is advancing in that regard.

We can find no basis in the record to second guess the trial court's judgment in the very sensitive balancing of the interests of the minor children and Dr. Smithson's commendable efforts toward recovery. Neither the trial court nor this Court can accurately predict the future, and as was observed by the trial court, the door remains open for Dr. Smithson to seek expansion of his parenting relationship with his children in the future as one day at a time he climbs the steps of continuing recovery.

The trial court set child support at \$3,200 per month. At the bar of this Court, the parties agreed that the proper amount of child support under the guidelines is \$2,820 per month. The judgment of the trial court will, therefore, be modified to reflect that the monthly child support payable by Dr. Smithson for the support and maintenance of his two minor children will be \$2,820 per month.

III. DEPLETION OF ASSETS

It is undisputed in the record that following the separation of the parties Dr. Smithson withdrew \$61,500 from the parties' joint Vanguard money market account number 0030-2492,

which constituted marital property. It is further undisputed that he depleted \$6,529 in refunds from the Mayo Clinic in the form of FICA refunds, which were also marital property.

The record is replete with efforts by counsel for Mrs. Smithson to get Dr. Smithson to account for these monies and repeated assurances by Dr. Smithson that he would do so. No accounting was ever made, and the trial court held:

15. In addition, the Court further finds that Dr. Smithson had depleted \$61,500.00 from the parties' marital estate by taking funds from the parties' joint Vanguard Money Market Account Number 0030-*2492, for which he promised to make an accounting and for which no accounting was ever forthcoming. Mrs. Smithson will, therefore, receive one-half of \$61,500.00, or \$30,750.00, as additional property.

16. In addition, Dr. Smithson has depleted \$6,529.00 in refunds received from The Mayo Clinic in the form of FICA refunds, for which Mrs. Smithson will receive one-half, or \$3,264.50, as additional property.

17. The Court finds that the total of one-half of the \$61,500.00 and one-half of the [\$6,529.00] equals \$34,014.50. The Court finds this amount of money shall be further credited to Mrs. Smithson by Mrs. Smithson receiving additional money from Dr. Smithson's Vanguard 403(b) account in the amount of \$34,014.50. Therefore, the Court finds, of the total amount of Dr. Smithson's Vanguard 403(b) account, as of December 2005, in the approximate amount of \$308,883.00, Mrs. Smithson's Vanguard shall receive \$91,702.00, or 29.69% of the current value of the Vanguard 403(b) account and that Dr. Smithson shall receive \$217,181.00, or 70.31% of the current value of the Vanguard 403(b) account.

The trial court's disposition as to these unexplained depletions of marital property by Dr. Smithson is clearly correct, and such action is affirmed.

IV. ATTORNEY'S FEES

Counsel for Mrs. Smithson filed an application in the trial court for an award of attorney's fees to Mrs. Smithson. The trial court held:

24. The Court has considered Mrs. Smithson's request for attorney's fees and expenses based upon Mr. Binkley's Affidavit. The Court concludes from all of the evidence that has been presented by both parties, including the parties' testimony, all exhibits, the findings of credibility and other facts presented in Mr. Binkley's Affidavit for Attorney's Fees, that Dr. Smithson has the greater ability to accumulate and replace assets than Mrs. Smithson and has the greater ability to pay expenses. In addition, if Mrs. Smithson is required to have to pay her attorney's fees, costs and expenses, it would further deplete her assets that she received in the division, therefore, there would then be an inequitable division of the parties' marital assets

and liabilities. The Court further concludes that Mr. Binkley's fees are reasonable and that the Court will add eight hours to Mr. Binkley's request of \$45,849.57 at his hourly rate, plus one hour to prepare the Court's Final Decree of Divorce, for a total of nine additional hours to be added to Mr. Binkley's bill, or a total of \$48,549.47.

The record contains no evidence that the amount of attorney's fees is excessive. This was a vigorously contested case on practically all issues. This Court has held:

An award of attorney fees constitutes alimony in solido. *Herrera v. Herrera*, 944 S.W.2d 379, 390 (Tenn.Ct.App.1996); *Cranford v. Cranford*, 772 S.W.2d 48, 52 (Tenn.Ct.App.1989). The decision whether or not to award attorneys fees is within the sound discretion of the trial court and "will not be disturbed upon appeal unless the evidence preponderates against such a decision." *Kincaid v. Kincaid*, 912 S.W.2d 140, 144 (Tenn.Ct.App.1995); *see* Rule 13-(d) Tenn.R.App.P.

Koja v. Koja, 42 S.W.3d 94, 98 (Tenn.Ct.App.2000).

Dr. Smithson has earnings and earning capacity of at least \$220,000 per year with many years of productive worklife before him. Mrs. Smithson has advanced formal education and the potential for rehabilitation; but, during the years ahead, she bears the primary responsibility for raising to adulthood the minor children of the parties. While she receives substantial assets in the division of marital property, she cannot pay her attorney's fees without diminishing those assets. The decision of the trial judge to compel Dr. Smithson to pay the attorney's fees of Mrs. Smithson is well within his discretion, and the evidence certainly does not preponderate otherwise.

As modified herein, the judgment of the trial court is affirmed, and the case remanded for such further proceedings as may be necessary and proper. Costs of the cause are assessed two-third to Appellant and one-third to Appellee.

WILLIAM B. CAIN, JUDGE